

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 MONROE COUNTY (HIGHWAY DEPARTMENT) : Case 82
 : No. 41815
 and : MA-5471
 :
 MONROE COUNTY HIGHWAY EMPLOYEES, :
 LOCAL UNION NO. 2470, AFSCME, AFL-CIO :
 :

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40,
 AFSCME, AFL-CIO, on behalf of the Union.
Mr. Edward G. Staats, Personnel Director, on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by Monroe County Highway Employees, Local Union No. 2470, AFSCME, AFL-CIO, hereinafter referred to as the Union, and concurred in by Monroe County (Highway Department), hereinafter the County, the Wisconsin Employment Relations Commission on March 28, 1989 appointed Robert M. McCormick as an impartial arbitrator to determine a dispute existing between said parties involving the County's suspension of grievant, Richard Stargard without pay on September 16, 1988. This procedure was conducted in accordance with the binding arbitration provisions of the labor agreement between the parties which was in effect for all times material herein, except that the parties waived the selection procedures for an arbitration board in favor of the undersigned's function as sole arbitrator and, further waived the provision that an award be made within ten (10) days of hearing. The hearing was conducted on May 17, 1989 at Sparta, Wisconsin. The final post-hearing briefs were received on June 28, 1989.

At outset of hearing the parties permitted the undersigned to frame the following

ISSUE

Did the County's suspension of the grievant, Richard Stargard, without pay for a three (3) day period for the grievant's conduct of September 16, 1988 constitute just cause within the meaning of Article 3, Management Rights, Section 1-D of the labor agreement? If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Article 3 - MANAGEMENT RIGHTS

Section 1. The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this Contract and applicable law. These rights include, but are not limited to the following:

- A. To direct all operations of the County;
- B. To establish reasonable work rules and schedules of work;
- C. To hire, train, promote, transfer, schedule and assign employees to positions within the County;
- D. To suspend, discharge and take other disciplinary action against employees for just cause;

. . .

The County's exercise of the foregoing functions shall be limited only by the express provisions of this Contract. If the County exceeds this limitation, the matter shall be processed under the grievance procedure.

Article 4 - GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this Agreement.

. . .

Section 5. Steps in the Procedure:

. . .

Step 2: The arbitration board shall consist of three (3) members, one member to be chosen by the County Personnel Committee, one member to be chosen by the Union, and the third member shall be chosen by the first two members and the third member shall be the Chairman of the Board. In the event the first two members are unable to agree on the third member, the third member shall be appointed by the Wisconsin Employment Relations Commission (WERC). The arbitration board shall make their findings known in writing simultaneously to the County Clerk and the Union, within ten (10) days after their final meeting, and their decision shall be final and binding on both parties. The cost of the arbitration board shall be borne equally between the Union and County. Each party shall pay the member they chose and both parties shall pay one-half (1/2) the cost of the third member. Disputes or differences regarding bargainable issues are expressly not subject to arbitration of any kind, notwithstanding any provisions herein contained. The arbitrator shall have no right to amend, nullify, modify, ignore, or add to the provisions of the Agreement. His/her authority shall be limited to the extent that he/she should only consider and decide the particular issue or issues presented to him/her in writing by the Employer or the Union, and his/her interpretation of this meaning or application of the language of the Agreement.

. . .

Article 6 - OVERTIME

Section 1. Overtime will not be expected in emergencies and any other overtime will not be approved for pay except when approved by the Highway Commissioner (sic) has the right to set overtime schedules in the manner most advantageous to the County and consistent with the requirement of the Municipal employment and the public interest.

. . .

Section 3. All overtime shall be distributed as evenly as possible among all employees, but the final decision shall be up to the Management subject to the grievance procedure.

. . .

Article 20 - GENERAL PROVISIONS

. . .

Section 2. General, but reasonable regulations may be posted by the administration and failure to adhere to these regulations shall be cause for discharge.

. . .

Section 5. The County shall not discipline or discharge an employee except for just cause. Any employee discharged and later through proper hearing is found innocent of the charges, said employee shall return to his/her former job with the County paying said employee all wages and benefits he/she would have earned had he/she been working, less any compensation received from Unemployment Compensation or other sources during the period of discharge.

. . .

The County also introduced its "Personnel Policy Manual" (designated County Exhibit #7 in Case 83) as being relevant and applicable herein, which the undersigned finds is not material to the issued joined herein, because the

labor agreement (Joint Exhibit #1), makes no express provision for incorporating same into the existing labor agreement.

BACKGROUND

The grievant Stargard is assigned to the Tomah shop which is located some fifteen (15) miles from the central shop in Sparta. His normal work duties involve driving a tandem truck, which as of September 15, 1988, 1/ was not in operation because of an accident involving a different driver. As a result, Stargard would be given alternate duties for September 16.

It was the regular practice for the Commissioner or his designee to issue the daily work instructions to the Tomah shop employes by telephone at outset of the morning schedule. The employes at the Tomah shop would gather near the office phone and receive such instructions by the numbers, i.e., passing the phone or laying it down for the next employe to receive the Commissioner's instructions.

There is no significant conflict as to the substance of Baker's version of the exchange between he and grievant that morning by telephone. Nonetheless both versions of said conversation are forth below.

Baker testified that when Stargard came to the phone he directed grievant to perform three (3) tasks namely checking his patrol section, road work and mowing. Baker said Stargard expressed dissatisfaction with the assignment, said "he was pissed" and that he (grievant) should be able to operate one of the tandem trucks assigned to other less senior employes. Baker testified that grievant stated "he would be giving up some overtime if he could not operate a tandem and that the grievant was being punished."

Baker testified that grievant became belligerent over the phone, that he (Baker) advised the grievant that he was not being punished; that he told grievant that he (Baker) did not care for Stargard's attitude and that he (Baker) would discuss the matter or problem with grievant later in the work day. Baker testified that the grievant testily replied, "you damn right we are going to."

With regard to Baker's exchange with grievant later in the afternoon at County Trunk M, Baker testified that he asked grievant just what his problem was. Baker testified that grievant stated he had no problem. Baker pressed grievant as to his complaint in view of the early morning telephone exchange and Baker testified that grievant replied "I don't want to talk about it now" and further stated, "I don't have to take your shit."

Baker, testifying under cross-examination from Pfeifer, testified that grievant told him that he did not mow, because it was raining in the Tomah area.

Grievant's version of the morning telephone conversation -- Stargard testified that he had not raised his voice on the telephone on the morning of September 16th; that he was not belligerent; that he did not purposefully lay the phone down without a salutation, but merely left it hang for the next employe to receive instructions; and that he did express dissatisfaction to the Commissioner over not getting assigned to tandem driving.

With regard to the County M confrontation, grievant testified that over the forenoon that day he had gone to the Sparta shop, and among other things, talked to a Union steward, who told him that he need not talk to Baker, if Baker jumped him later, if there was no Union steward present; that when Baker pressed him that afternoon about his problem he advised Baker that he did not have to discuss that matter without a Union steward present. The record evidence however indicates that grievant did not explicitly ask Baker that a Union steward be present. The record evidence also reveals that grievant did not deny that he had earlier told Baker over the phone, that he was only too glad to talk about his complaint later that day.

Grievant further testified that Baker did raise his voice at the job site and was losing his temper; and that he (grievant) told Baker that he wanted to be left alone; and that Baker then suspended him.

Union witnesses Larson and Lambert testified that they were near the phone on the morning of the 16th and did not believe grievant spoke loudly, nor belligerently, and that he (Stargard) did not use any foul language.

Baker suspended grievant for three days without pay and confirmed the same in writing on September 20, which reads as follows:

Reasons for Mr. Stargard Three Day Suspension.

1/ All dates refer to 1988, unless otherwise specified.

Because the Tandem Mr. Stargard was driving was down, due to an accident on Thursday, Sept. 15, 1988, it was necessary to put him back on his section on Friday, Sept. 16, 1988. He did not like this or the job assignments that were given to him, in fact, he got belligerent over the phone that morning.

He did not perform the appointed tasks. Instead, he drove to Sparta without first getting permission, picked up recycled blacktop in the pit, then went to the shop, picked up two shovels to replace those that he claims he lost. He then hung around the shop, ate his lunch there and then went over to the Administration Building to check on his personnel file. This was approximately 1:30 P.M. He came to Sparta at approximately (sic) 10:45 A.M.

Later in the afternoon, when I was able to locate him to talk this situation over, he became belligerent, verbally abusive and insubordinate.

Rather than terminate his employment with Monroe County, I chose to give him the three days suspension to reconsider his attitudes.

This is not the first time we have had problems with Richard.

This problem will be further discussed with Personnel and the Highway Committee to see if further action shall be taken.

Grievant filed a grievance on October 10, alleging in part, that the suspension was in violation of, "Article 3 and any other Article that may be applicable."

There was extensive testimony by Baker and Stargard relating to grievant's trip into the Sparta shop, which Baker cited in the second paragraph of his memo "Reasons for Mr. Stargard Three Day Suspension." Baker however testified that he did not learn of grievant's trip, made without supervisory permission, until after the suspension had been effectuated. The arbitrator ruled that the County could not rely upon paragraph 2 of Exhibit 2 as a basis for sustaining the adjudged insubordination as a constructive refusal to perform the three tasks assigned, on the theory that grievant moved to the main shop without authorization.

Grievant testified that he had a message from some office secretary, to see her at the Sparta shop about some problem; that he (grievant) assumed it was about an insurance problem; and that while there he secured his personnel file from another clerk and examined the recorded written discipline therein, previously issued; and that he also talked to a Union steward about his expected confrontation with Baker. Grievant further testified that the steward told him that he did not have to discuss details with Baker unless a Union steward was present.

The record is uncontroverted that grievant was previously warned for improperly signing other employes names to a posting and also for posting a "Solidarity" sticker (i.e. Polish International News) on the bulletin board contrary to work rules.

POSITIONS OF THE PARTIES

The County argues that the grievant did not specify in his grievance just how the County did him wrong by the suspension. The County avers that grievant's misconduct involves four elements, his telephone confrontation with Baker on the phone on the morning of the 16th; grievant's failure to perform the three assigned tasks; the abusive retorts of grievant at the job site near 2:30 p.m. and grievant's refusal to discuss his problems, when he had previously stated in the morning that he was anxious to discuss them in the afternoon; and the prior progressive discipline meted out to grievant, namely, two written reprimands.

The County points out that grievant was quick to explain his failure to mow roadside grass on the lame claim that it was raining in Tomah; and that grievant had time to burn up 1 to 2 hours in the course of an unauthorized trip to Sparta.

At the job site, after previously advising Baker in the morning that he welcomed discussion of his (grievant's) complaints with Baker when the two should meet later in the day, the grievant did make an abusive remark to Baker to wit, "I don't have to take your shit."

The County urges that the record evidence supports a finding of insubordinate and abusive conduct on the part of grievant, and that therefore the grievance should be denied and the just cause discipline be sustained.

The Union argues that grievant did not telephonically refuse to perform the three assigned tasks, when Baker gave him instructions. Grievant merely expressed his disappointment in not drawing the more attractive assignment of truck driving, and conveyed that fact in a non-abusive manner.

The Union argues that the record indicates that grievant did perform road-work tasks and surveyed his patrol section. The only reason he did not perform mowing was because of the rain, and the evidence is clear that the highway crews did not mow when it rained.

The Union argues that the Commissioner cannot rely upon the so called "unexcused" trip to Sparta as if it were an independent act of insubordination, or as some constructive failure to perform assigned tasks, since Baker's testimony indicates that he did not rely upon such an unknown transgression at the time Baker issued the suspension on September 16th.

The Union requests that the discipline be found to be one for lack of just cause and that grievant be made whole for the three day deprivation in pay.

DISCUSSION

The undersigned finds that the grievant has properly identified in his grievance the wrong doing committed by the County under the labor agreement and/or the contract provision allegedly violated. It was sufficient for the grievant to cite the County's claimed violative conduct as being contrary to Article 3, 1-D of the contract.

An examination of the record reveals some further testimony of the grievant relating to what he meant, and why he was justified in stating to Baker at the job site, "I don't have to take your shit."

Stargard testified that an example of that condition involved the information he secured from fellow employes about Lambert's misfortune in experiencing a job-injury to his eye, and the reaction Baker displayed - by telling Lambert to the effect he (Lambert) put something in his eye.

An examination of the record reveals that Lambert testified that his exchange with Baker over the eye injury incident was an after the fact time-clock area conversation and that the verbal taunts of both were blown out of proportion.

The testimony of the grievant and lack of corroboration from Lambert, plus grievant's quick and potentially premature response to Baker in the course of the morning telephone directions, namely, that a Tomah rain would prevent him from performing mowing -- leads the undersigned to discredit the grievant's version of the job site conversations. In addition, though the undersigned ruled that the County could not rely upon grievant's unauthorized trip as some how establishing a constructive refusal to perform the three assigned tasks, I have reviewed grievant's rambling testimony as to why it was necessary to make the trip and what he accomplished -- as part of a total evaluation of his creditability.

Baker was succinct and thorough in his testimony regarding the complete tenor of the telephone exchange and the job site verbal exchanges.

I credit Baker, in his version, that grievant told him he was only too glad to discuss his (grievant's) complaint later in the day in relation to his expressed unhappiness with not being assigned a tandem truck. At the job site, grievant as much as concedes that he did not want to discuss the matter at length.

The undersigned concludes that grievant's version, that a secretary left him instructions to see her about some vague insurance question, further undermines his credibility. Stargard conceded on cross-examination, when questioned by arbitrator, that there was no message that he proceed to Sparta that very day to see said secretary.

The undersigned concludes that the grievant's trip to Sparta was a pretext. The so called advice from a steward not to discuss his "problem" with Baker without Union representation, I believe constitutes grievant's "covering his derriere with paper" to explain away his otherwise abusive job-site retort, "I don't have to take your shit."

AWARD

The undersigned finds the suspension of grievant, Richard Stargard, for his conduct of September 16, 1988, to be one for just cause within the meaning

of the labor agreement, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 17th day of July, 1990.

By _____
Robert M. McCormick, Arbitrator